UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN

UNITED STATES OF AMERICA, NO. 03-80244

Plaintiff, HON. VICTORIA A. ROBERTS
United States District Judge

v. Magistrate Judge David R. Grand

D-22 MARCO ANTONIO PAREDES-MACHADO,

Defendant.

GOVERNMENT'S RESPONSE TO PAREDES-MACHADO'S OBJECTIONS TO THE MAGISTRATE'S REPORT AND RECOMMENDATION

Paredes-Machado was indicted in 2005 after he spent years exporting thousands of kilograms of marijuana to the United States from Mexico. More than five years later, Paredes-Machado was arrested in Mexico for that indictment. Paredes-Machado alleges that after his lawful arrest he was tortured by the Mexican police and has now moved the Court to dismiss his 2005 indictment because of the alleged 2010 conduct.

After extensive briefing and argument, the Magistrate Judge correctly determined that it "is clear that there is no authority to dismiss the indictment" and recommended this Court deny the motion. (R. 910: R&R, 4816). Although Paredes-Machado has now attempted to characterize his motion as arising out of a

due process right to decency rather than outrageous government conduct, the result is the same: there is no authority to dismiss the indictment. This Court should overrule Paredes-Machado's objection and deny his motion to dismiss.

BRIEF

Paredes-Machado moved for the dismissal of his indictment under *United States v. Russell*, 411 U.S. 423 (1973), due to alleged outrageous government conduct. (R. 885: Motion to Dismiss, 4251). The government is unaware of a single instance in which this defense has resulted in the dismissal of an indictment and it may not even exist in the Sixth Circuit. *United States v. Tucke*r, 28 F.3d 1420, 1423 (6th Cir. 1994); *United States v. Warwick*, 167 F.3d 965, 974 (6th Cir. 1999); *Monea v. United States*, 914 F.3d 414, 419 (6th Cir. 2019). If it does, it requires, at a minimum, the government's direct involvement in the criminal activity that was charged. *Id*. Paredes-Machado did not claim nor can he show this; the alleged conduct of the Mexican police officers took place more than five years after he had been indicted.

Not liking the limitations of the defense he asserted, Paredes-Machado tries to side step them by creating a new defense: the motion to dismiss is based on a violation of what he now describes as the principle of decency. (R. 915: Objection to R&R, 4847). But this new name does not help Paredes-Machado. He cites over

70 cases but not one resulted in the dismissal of an indictment for a violation of the principle of decency. And although he cites scores of cases, Paredes-Machado's argument relies principally on three: *Rochin v. California*, 342 U.S. 165 (1952); *United States v. Russell*, 411 U.S. 423 (1973), and, *United States v. Toscanino*, 500 F.2d 267 (1974). Neither these cases, all thoroughly examined by the Magistrate Judge, nor any of the others Paredes-Machado cites, support his motion. The Court should overrule his objection and deny it.

1. *Rochin* did not authorize the dismissal of an indictment for post-offense conduct.

Paredes-Machado argues that *Rochin v. California*, 342 U.S. 165 (1952), recognized a distinct principle of decency that authorizes the dismissal of an indictment for abusive conduct by police. (R. 885: Motion to Dismiss, 4316; R. 915: Objection to R&R, 4843). This is incorrect. The court in *Rochin* reversed because he was convicted using evidence that was obtained unconstitutionally.

Rochin was decided before the Supreme Court applied the Fourth Amendment's exclusionary rule to the states. In *Rochin*, the police broke into Rochin's house without a warrant because they had "some information" that Rochin was selling drugs there. *Id.* at 166. When the officers encountered Rochin, he put capsules in his mouth. *Id.* The police handcuffed Rochin, forced his mouth

open, took him to the hospital and pumped his stomach—all still without a warrant. *Id.* After the police recovered the morphine capsules from his stomach contents, Rochin was charged with illegally possessing them. *Id.* At his trial, Rochin objected to the admission of the drugs, the objection was overruled, and, Rochin was convicted. *Id.*

The Supreme Court noted that the many ways the police violated Rochin—by breaking into his home and his mouth and his stomach—in order "to obtain evidence is bound to offend even hardened sensibilities." *Id*. at 172. And so they found that "the conviction of the petitioner has been obtained by methods that offend the Due Process Clause" and reversed the lower court's admission of the evidence. *Id.* at 174. This result would be routine today. As the Supreme Court stated more recently, "*Rochin*, of course, was decided long before [the exclusionary rule cases], and today would be treated under the Fourth Amendment, albeit with the same result." *Cty. of Sacramento v. Lewis*, 523 U.S. 833, 849, n. 9 (1998).

Contrary to Paredes-Machado's argument, *Rochin* did not create distinct principles of fairness and decency, one of which—fairness—allows for the exclusion of evidence and the other of which—decency—allows for the dismissal of an indictment. (R. 915: Objection to R&R, 4844-4845, 4847). Rather, the Court

simply excluded unlawfully obtained evidence. It noted that if the police had forced words from Rochin's mouth, they would have been suppressed. *Rochin*, 342 U.S. at 173. And forcing physical evidence from his mouth was no less "constitutionally obnoxious," so should have the same result: exclusion. *Id.*

Here, the only evidence that came from Paredes-Machado's arrest was a statement. And the government has agreed to suppress that already. Thus, there is no risk Paredes-Machado will be convicted using evidence that was obtained unconstitutionally. This is all *Rochin* requires.

2. Nor did *Russell* authorize the dismissal of an indictment for violating principles of decency.

United States v. Russell, 411 U.S. 423 (1973), is a case about entrapment. In it, the defendant argued on appeal that, even though he may have been predisposed to commit a crime, he should have been acquitted because he was entrapped as a matter of law when the government involved itself in his criminality. *Id.* at 427. In the context of that "expanded" entrapment argument, the Court opined that "someday" the conduct of law enforcement might be so outrageous that prosecution would be barred; in that case it was not. *Id*. at 427, 431-432. As the Magistrate Judge here noted, in *Russell*, "the Court was merely recognizing (without deciding) that government conduct that was intertwined in the underlying

criminal conduct could conceivably not constitute 'entrapment,' yet still be 'so outrageous' as to bar the government from prosecuting the charge." (R.910: R&R, 4812-4813).

Time and again, *Russell* has been discussed as authority for the "outrageous government conduct" defense, which involves, at a minimum, significant government involvement in the underlying crime. "Since this dicta was uttered, *Russell* has been cited more than two hundred times as authority for a defense based solely on an *objective* assessment of the government's conduct. Thus, the Court's dicta in *Russell* spawned the very defense which a majority of Justices in that case sought to foreclose." *United States v. Tucker*, 28 F.3d 1420, 1423 (6th Cir. 1994). But, "[i]n more than two dozen cases . . . , [the Sixth Circuit] has rejected 'on the facts' every attempt to invoke the so-called 'due process' defense. In our view, therefore, there is no authority in this circuit which holds that the government's conduct in inducing the commission of a crime, if 'outrageous' enough, can bar prosecution of an otherwise predisposed defendant under the Due Process Clause of the Fifth Amendment." *Id* at 1424 (internal citations omitted).

And although it has been routinely rejected by courts, this *Russell*-based expanded entrapment defense has, at least been discussed as theoretically possible. The remedy sought by Paredes-Machado—the dismissal of an indictment for an

alleged post-indictment violation of a "principle of decency"—has not. If, as Paredes-Machado claims, "*Russell* mandates a dismissal," (R. 915: Objection to R&R, 4854), for a post-offense, post-indictment, post-arrest violation of the principle of decency, at least one case in the almost 50 years since *Russell* should have held that. But none has.

3. *Toscanino* is inapplicable here because Paredes-Machado was not unlawfully brought within the jurisdiction of the Court.

Between his motion and objection to the Magistrate Judge's report and recommendation, Paredes-Machado cited more than 70 cases. As far as the government can tell, not one of those cases resulted in the dismissal of an indictment for post-offense conduct that violated a principle of decency. Nor can the government locate any case standing for that proposition. The closest Paredes-Machado comes is *United States v. Toscanino*, 500 F.2d 267 (1974). But as the Magistrate Judge determined, "this holding does not help Paredes-Machado." (R. 910: R&R, 4814).

In *Toscanino*, the defendant was tortured during his forcible, and extra-judicial, extradition. *Id*. at 269-270. Under most circumstances, a court's ability to try an individual is not "impaired by the fact that he had been brought within the

court's jurisdiction by forcible abduction.'" *Id.* at 272 (quoting *Frisbie v. Collins*, 342 U.S. 519, 522 (1952). The Seventh Circuit held, however, that

> when an accused is kidnapped and forcibly brought within the jurisdiction, the court's acquisition of power over his person represents the fruits of the government's exploitation of its own misconduct. Having unlawfully seized the defendant in violation of the Fourth Amendment, which guarantees 'the right of the people to be secure in their persons . . . against unreasonable . . . seizures,' the government should as a matter of fundamental fairness be obligated to return him to his status quo ante.

Id. at 275. In other words, the court would not allow the government to profit from its wrongdoing, so it excluded the fruit of the wrongdoing by returning the defendant to his country. Here, Paredes-Machado does not argue that his arrest or extradition were unlawful nor that the government gained anything from his alleged torture. Thus, *Toscanino* would not help him, even if it were the law in the Sixth Circuit, which it is not.

Although he cited and relied on *Toscanino* in his motion, Paredes-Machado now describes its analysis as "muddled" and argues that the later Second Circuit case, *U.S. ex rel Lujan v. Gengler*, 510 F. 2d 62 (2d Cir. 1975), clears up that reasoning in his favor. This is incorrect. In *Lujan*, the court reviewed the claims of another extradited defendant and held there was no basis to divest the district court of jurisdiction. *Id.* at 68. Paredes-Machado argues that "[i]n *Lujan*, the

Second Circuit limited *Toscanino* to acts of extreme brutality or 'shocking government conduct.'" (R. 915: Objection to R&R, 4852). In truth, the court did not "decide . . . whether, in the absence of a claim of torture or of similar reprehensible conduct, the violation of international law alone would require dismissal of an indictment." *Lujan*, 510 F.2d at 68.

Paredes-Machado selectively quotes from the concurrence in *Lujan* to support his argument that *Toscanino* was about torture and not abduction. *Toscanino*, he quoted, "rested solely and exclusively upon the use of torture and other cruel and inhumane treatment." (R. 915: Objection to R&R, 4852). The portion of the quote that Paredes-Machado omitted undermines, rather than supports, his position, however: *Toscanino* rested "solely and exclusively upon the use of torture and other cruel and inhumane treatment of Toscanino *in effecting his kidnapping*." *Lujan*, 510 F.2d at 69 (emphasis added). Because the defendant in *Lujan* could not show both abduction and torture, the jurisdiction of the court did not need to be suppressed.

Toscanino has not been accepted in the Sixth Circuit, and has been rejected by several others. *United States v. Pelaez*, 930 F.2d 520, 525 (6th Cir. 1991). But even if it were the law here, it does not help Paredes-Machado. The court in *Toscanino* applied the Fourth Amendment's exclusionary rule to the government's

wrongful kidnapping of the defendant. Because the kidnapping violated his Fourth Amendment rights, the court excluded its fruit: jurisdiction over the defendant. It did not create a freestanding right to dismissal for conduct unrelated to the offense or proceeding. Paredes-Machado's argument attempts to divorce and expand the holding from its facts and should be denied. (R. 915: Objection to R&R, 4852).

4. The Magistrate Judge was correct.

The Magistrate Judge correctly recommended that this motion be denied "because the government conduct in question is in no way intertwined with the criminal activity for which he is charged." (R. 910: R&R, 4803). Two different district courts have come to the same conclusion.

The district court in *United States v. Padilla*, 2007 WL 1079090, at *3 (S.D. Fla. Apr. 9, 2007), analyzed the outrageous government conduct defense on facts similar to those alleged by Paredes-Machado. There, the defendant had been declared an enemy combatant, taken from Chicago and transferred to United States military custody where he claimed he was interrogated in a manner that would "shock the conscience." *Id.*at *1. He was then transferred to civilian custody to face charges related to his pre-detention conduct. *Id.* Like here, Padilla brought a motion to dismiss the indictment under *Russell* based on outrageous government

conduct that occurred while he was in military custody. *Id.* at 2. And like here, Padilla "relied heavily" on *Toscanino*. *Id.* at 5.

For the purpose of the motion, the court accepted Padilla's allegations as true. Nonetheless, the court denied the motion. Because Padilla claimed that the government's abuse took place after his commission of the crimes, dismissal of the indictment was not an appropriate remedy. "Short of resorting to a 'two wrongs make a right' judicial process, it is difficult for this Court to ascertain how the remedy sought emanates from the infirmity defendant describes." *Id.* at 4.

Similarly, in *United States v. Leon*, No. 09 CR 383-16, 2018 WL 4339374 (N.D. Ill. Sept. 11, 2018), a district court again denied a motion to dismiss based on alleged post-offense outrageous government conduct. There, counsel for Paredes-Machado argued on behalf of another defendant connected to the Sinaloa Cartel, that the defendant had been tortured at the hands of the Mexican police months after his indictment. *Id.* at 2-3. And, like here, the defendant relied on *Rochin*, *Russell*, and *Toscanino*. *Id.* at 4-6.

The court noted, however, that "[s]ince *Rochin* was decided, the Supreme Court has repeatedly cautioned lower courts against applying more general 'due process' principles when a specific constitutional provision applies." *Id.* at 6. And because there was "nothing in the law of the Seventh Circuit to support" his

argument that an indictment could be dismissed for post-indictment misconduct, the court denied the motion. *Id.* at 4. What was true in the Seventh Circuit is also true in the Sixth: there is no authority to support the defendant's motion. It should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on Friday, June 07, 2019, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following:

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